United Overseas Bank (M) Bhd v Mok Hue Huan & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO MT3–22–791 OF 2003
MOHD ZAWAWI J
20 OCTOBER 2009

Banking — Securities for advances — Charge action to recover sums due — Interest — Security not realised within stipulated statutory period — Whether secured creditors prohibited from claiming further interest on debt after statutory period — Bankruptcy Act 1967 s 8(2A) — Whether parties could not circumvent or contract out of s 8(2A) of the Bankruptcy Act 1967

Contract — Void contract — Contrary to public policy — Agreement to circumvent effect of s 8(2A) of the Bankruptcy Act 1967 — Whether agreement unlawful and void — Contracts Act 1950 s 24(b)

Land Law — Sale of land — Order for — Charge action to recover sums due — Security not realised within stipulated statutory period — Whether secured creditors prohibited from claiming further interest on debt after statutory period — Bankruptcy Act 1967 s 8(2A) — Whether parties could not circumvent or contract out of s 8(2A) of the Bankruptcy Act 1967

The first and second defendants were guarantors of a loan granted by the plaintiff (chargees) to a company known as Monzo (M) Sdn Bhd ('Monzo') (chargors). The defendants executed a letter of guarantee and indemnity dated 15 February 2001 ('LG 2001') in favour of the plaintiff. The first defendant was adjudicated a bankrupt on 25 October 2002. Monzo was wound up on 19 June 2002. The plaintiff obtained the order for sale of Monzo's properties on 25 July 2006, more than four years after Monzo was wound up. The second defendant contested the plaintiff's claim for amount due to the plaintiff. The amount that was stated to be due to the plaintiff under the LG 2001 as at 19 June 2002 was RM1,022,134.77. The plaintiff also claimed interest from the second defendant under a separate and independent contract, that is the letter of guarantee and indemnity dated 14 November 2000 ('LG 2000'). It was submitted that s 8(2A) of the Bankruptcy Act 1965 ('the Act') protected the borrower which had been wound up but not the guarantor who was not a bankrupt. The defendant argued that the plaintiff could not claim any interest after 19 June 2002 when

the winding up order was obtained and the total amount due to the plaintiff cannot exceed RM1,022,134.75; ie amount due as at 19 June 2002. This application concerned the interpretation of s 8(2A) of the Act. The issue to be determined by the court was whether the plaintiff could claim interest after 19 June 2002 by virtue of s 8(2A) of the Act read together with s 4(1) of the Civil Law Act 1956.

Held, allowing the plaintiff's claim:

(1) Section 8(2A) of the Act is a 'statutory clamp' on secured creditors prohibiting them from claiming any further interest on the debt after the statutory period. There is no exception to the said section. Lenders/chargees are required by law to realise their security swiftly within six months of the adjudication order or winding up order failing which they cannot claim any interest whatsoever on the debt (see para 20).

(2) As at 19 June 2002, the amount due to the plaintiff was RM1,022,134.75. The plaintiff had six months to realise its securities on or before 18 December 2002. The amount due to the plaintiff was RM1,077,407.39 (inclusive of interest as at 18 December 2002). Since the plaintiff did not realise the securities before 18 December 2002, the plaintiff was only entitled to RM1,022,134.77 as at 19 June 2002, the date of winding up of the company (see para 27).

(3) The plaintiff's claim for interest under the LG 2000 was misconceived because: (a) s 8(2A) of the Act read together with s 4(1) of the Civil Law Act 1956 forbids such a claim; (b) there is no provision in s 8(2A) of the Act to allow the plaintiff to contract out and therefore the LG 2000 was void to that extent; and (c) the contract contained in the LG 2000 making the guarantor liable for interest after the statutory period was void, illegal and unenforceable as it defeated the purpose and intent of s 8(2A) of the Act. The LG 2000 was part and parcel and connected and made pursuant to the charge. It was not an independent and separate document (see para 33(a)–(e)).

(4) Where the consideration or object of an agreement is of such a nature that, if permitted, would defeat any law, such an agreement is unlawful and thus void by virtue of cl (b) of s 24 of the Contracts Act 1950 (see para 36).

[Bahasa Malaysia summary

Defendan pertama dan kedua merupakan penjamin-penjamin pinjaman yang diberikan oleh plaintif (pemegang gadaian) kepada sebuah syarikat yang

dikenali sebagai Monzo (M) Sdn Bhd ('Monzo') (penggadai). Defendan-defendan menandatangani surat jaminan dan indemniti bertarikh 15 Februari 2001 ('SJ 2001') bagi pihak plaintif. Defendan pertama diisytihar bankrap pada 25 Oktober 2002. Monzo digulungkan pada 19 Jun 2002. Plaintif mendapat perintah untuk menjual hartanah Monzo pada 25 Julai 2006, lebih daripada empat tahun selepas Monzo digulungkan. Defendan kedua mencabar tuntutan plaintif bagi jumlah perlu dibayar kepada plaintif. Jumlah yang dikatakan perlu dibayar kepada plaintif di bawah SJ 2001 pada 19 Jun 2002 ialah RM1,022,134.77. Plaintif juga menuntut faedah daripada defendan kedua di bawah kontrak yang berbeza dan bebas, iaitu surat jaminan dan indemniti bertarikh 14 November 2000 ('SJ 2000'). Dihujahkan bahawa s 8(2A) Akta Kebankrapan 1965 ('Akta') melindungi peminjam yang digulungkan tetapi bukannya penjamin yang tidak bankrap. Defendan menghujah bahawa plaintif tidak boleh menuntut apa-apa faedah selepas 19 Jun 2002 apabila perintah penggulungan diperoleh dan jumlah yang perlu dibayar kepada plaintif tidak melebihi RM1,022,134.75; iaitu jumlah perlu dibayar setakat 19 Jun 2002. Permohonan ini berhubung dengan pentafsiran s 8(2A) Akta. Isu yang perlu ditentukan oleh mahkmah ialah sama ada plaintif boleh menuntut faedah selepas 19 Jun 2002 menurut s 8(2A) Akta dibaca bersama dengan s 4(1) Akta Undang-Undang Sivil 1956.

Diputuskan, membenarkan tuntutan plaintif:

(1) Seksyen 8(2A) Akta merupakan 'statutory clamp' ke atas pemiutang-pemiutang bercagar menghalang mereka daripada menuntut apa-apa faedah lanjutan ke atas hutang selepas tempoh statutori. Tidak terdapat pengecualian kepada seksyen tersebut. Pemberi pinjaman/pemegang gadaian diperlukan dari segi undang-undang untuk merealisasikan cagaran secepatnya dalam masa enam bulan daripada perintah penghakiman atau penggulungan di mana sekiranya gagal berbuat demikian, mereka tidak dapat menuntut apa-apa faedah pun ke atas hutang tersebut (lihat perenggan 20).

(2) Setakat 19 Jun 2002, jumlah yang perlu dibayar kepada plaintif ialah RM1,022,134.75. Plaintif mempunyai masa enam bulan untuk merealisasikan cagarannya pada atau sebelum 18 Disember 2002. Jumlah yang perlu dibayar kepada plaintif ialah RM1,077,407.39 (termasuk faedah pada 18 Disember 2002). Memandangkan plaintif tidak merealisasikan cagaran sebelum 18 Disember 2002, maka plaintif hanya berhak kepada RM1,022,134.77 pada 19 Jun 2002, iaitu tarikh penggulungan syarikat (lihat perenggan 27).

(3) Tuntutan plaintif untuk faedah di bawah SJ 2000 adalah tersalah tanggapan kerana: (a) s 8(2A) Akta di baca bersama s 4(1) Akta

Undang-Undang Sivil 1956 melarang tuntutan sedemikian; (b) tidak terdapat peruntukan dalam s 8(2A) Akta untuk membenarkan plaintif menamatkan kontrak dan oleh itu SJ 2000 tidak sah sehingga tahap tersebut; dan (c) kontrak yang terkandung dalam SJ 2000 menjadikan penjamin bertanggungan untuk faedah selepas tempoh statutori adalah tidak sah, menyalahi undang-undang dan tidak boleh dikuat kuasakan memandangkan ia menghalang tujuan s 8(2A) Akta. SJ 2000 adalah sebahagian dan berhubung dan dibuat berhubung dengan gadaian tersebut. Ini bukanlah dokumen yang bebas dan berbeza (lihat perenggan 33(a)–(e)).

(4) Di mana pertimbangan atau tujuan perjanjian tersebut, sekiranya dibenarkan, bersifat menyangkal mana-mana undang-undang, perjanjian tersebut adalah menyalahi undang-undang dan oleh itu tidak sah menurut klausa (b) s 24 Akta Kontrak 1950 (lihat perenggan 36).]

Notes

For a case on contrary to public policy, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 5524.

For cases on order for, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4131–4234.

For cases on securities for advances generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2097–2270.

Cases referred to

Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd [1997] 1 MLJ 587, CA (refd)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)

Hee Cheng v Krishnan [1955] MLJ 103, HC (refd)

Hong Leong Finance Bhd v Thamilchelevan s/o Palinesamy & Anor [2002] 2 MLJ 466, CA (refd)

Johnson v Moreton [1980] AC 37, HL (refd)

OCBC Bank (M) Bhd v Tan Eng Kwee and another application [2003] 6 MLJ 470; [2003] 3 CLJ 161, HC (refd)

Pepper v Hart [1992] 3 WLR 1032; [1993] 1 All ER 42, HL (refd)

Perwira Affin Bank Bhd v MDV Technical Services Sdn Bhd [2008] 4 CLJ 66, HC (refd)

Public Bank Bhd v Ong Wen Wah & Ors [2007] 1 MLJ 490; [2007] 1 CLJ 222, HC (refd)

RHB Bank Bhd v Ya'acob Mohd Khalib @ Abdul Ghani bin Muhammad [2008] 1 MLJ 157; [2008] 1 CLJ 80, CA (refd)

SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, FC (refd)

A *United Asian Bank Bhd v A Subramaniam (as the personal representative of Roshammah a/p Samual (deceased)) & Ors* [1994] 3 CLJ 681, HC (refd)

Legislation referred to

Bankruptcy Act 1965 s 8, 8(2A)
B Civil Law Act 1956 s 4(1)
Contracts Act 1950 ss 24, 24(a), (b), (e), 79, 80, 81
Pool Betting Act 1967 s 5

Ng Shee Boo (Mak, Ng, Shao & Kee) for the plaintiff.
C *Mala K Nathan (PK Nathan & Co) for the defendants.*

Mohd Zawawi J:

INTRODUCTION

D

[1] This application ('encl 16') concerns the interpretation of s 8(2A) of the Bankruptcy Act 1965 ('the Act'). The issue of law to be determined by this court is simply this: whether the plaintiff can in law claim interest after 19 June 2002, the date of winding up order of Monzo, by virtue of s 8(2A) of the Act read together with s 4(1) of the Civil Law Act 1956.
E

AGREED FACTS

F **[2]** The agreed facts are as follows.

[3] The first and second defendants are guarantors of a loan granted by the plaintiff (chargees) to a company known as Monzo (M) Sdn Bhd ('Monzo') (chargors) on 30 January 2001.
G

[4] The first and second defendants have executed a letter of guarantee and indemnity dated 15 February 2001 in favour of the plaintiff and the first and second defendants are deemed to be principal debtors under the said letter of guarantee and indemnity.
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[5] The first defendant has been adjudicated a bankrupt in Singapore on 25 October 2002.

I **[6]** Monzo was wound up on 19 June 2002.

[7] The plaintiff obtained the order for sale of Monzo's two properties on 25 July 2006, more than four years after Monzo was wound up on 19 June 2002.

[8] The second defendant is contesting the plaintiff's claim for summary judgment vide summons in chambers dated 5 October 2006 ('encl 16') only with regard to the amount due to the plaintiff.

[9] The second defendant was provided with the statement of accounts only in December 2008 and January 2009 and it is only from the said accounts will this court be able to know what amount is lawfully due to the plaintiff that is whether the amount due should be the outstanding amount as at the date of winding up of Monzo which was on 19 June 2002.

[10] The statement of accounts provided by the plaintiff also shows a full detailed account showing the interest the plaintiff is claiming to be due after the winding up that is from 19 June 2002 to 30 November 2008 and further interest from 1 December 2008 at RM10,250 per month until settlement.

[11] The amount that is stated to be due to the plaintiff as at 19 June 2002 (the date of winding up of Monzo (M) Sdn Bhd) is RM1,022,134.77.

SUBMISSION OF LEARNED COUNSEL FOR THE PLAINTIFF

[12] Learned counsel for the plaintiff contended that the plaintiff's right to claim against the second defendant for the amount (that is to continue charging interest against the second defendant even after the borrower/principal debtor was wound up) falls under the said letter of guarantee and indemnity dated 14 November 2000. The said letter is a contract made between the plaintiff and the second defendant as the guarantor. The plaintiff is actually claiming the interest amount from the second defendant as the guarantor under a separate and independent contract, that is the letter of guarantee and indemnity dated 14 November 2000.

[13] Learned counsel submitted further that s 8(2A) of the Act protects the borrower/plaintiff who had been wound up on 19 June 2000 but not the guarantor and who is not a bankrupt. The section was introduced by Parliament to protect bankrupts against interest claimed by the secured creditor.

[14] To support his argument, learned counsel cited the following authorities:

(a) *Public Bank Bhd v Ong Wen Wah & Ors* [2007] 1 MLJ 490; [2007] 1 CLJ 222;

(b) *Hong Leong Finance Bhd v Thamilchelevan s/o Palinesamy & Anor* [2002] 2 MLJ 466; and

(c) ss 79, 80 and 81 of the Contracts Act 1950.

[15] The gist of his argument is that the plaintiff's claim against the second defendant is a distinct and separate claim from the borrower/principal debtor. There are conceptual and fundamental legal differences between contracts of guarantee and contract of indemnity. Under a contract of indemnity, the promissory undertakes an original and independent obligation to indemnify, which does not depend upon the existence of any other obligation of any other obligator. It is a contract by one party to keep the other harmless against loss. It has no reference in law to the obligation of any third persons. When an undertaking given by a person constitutes an indemnity, the person giving the indemnity assumes a primary obligation for the payment of the principal debt. Liability under a contract of indemnity does not depend on whether the principal debt is enforceable.

[16] The second defendant can be rendered liable even though the principal contract is unenforceable against the borrower/principal debtor due to s 8(2A) of the Act and s 4(1) of the Civil Law Act 1956.

SUBMISSION OF LEARNED COUNSEL FOR THE DEFENDANT

[17] Learned counsel for the defendant submitted that the plaintiff cannot claim any interest after 19 June 2002 when the winding up order was obtained and the total amount due to the plaintiff regarding Monzo (M) Sdn Bhd's debt cannot exceed RM1,022,134.75; ie amount due to the plaintiff as at 19 June 2002.

[18] The maximum claim of the plaintiff is statutorily capped up to 19 June 2002 because the plaintiff was unable to realise their security within six months from 19 June 2002 (the date of the winding up order). The plaintiff obtained the order for sale of Monzo's two properties on 25 July 2006 and 3 November 2006, more than four years after Monzo was wound up on 19 June 2002. The amount is statutorily capped at RM1,022,134.75.

[19] To support his argument, learned counsel for the defendant relied upon the following authorities:

(a) s 8(2A) of the Act;

(b) *OCBC Bank (Malaysia) Bhd v Tan Eng Kwee* [2003] 6 MLJ 470; [2003] 3 CLJ 161;

(c) *RHB Bank Bhd v Ya'acob Mohd Khalib @ Abdul Ghani bin Muhammad* [2008] 1 MLJ 157; [2008] 1 CLJ 80;

(d) *Perwira Affin Bank Bhd v MDV Technical Services Sdn Bhd* [2008] 4 CLJ 66; and

(e) *United Asian Bank Bhd v A Subramaniam (as the personal representative of Roshammah a/p Samual (deceased)) & Ors* [1994] 3 CLJ 681.

FINDINGS OF THE COURT

[20] I am in full agreement with the submission of learned counsel of the defendant that s 8(2A) of the Act is a 'statutory clamp' on secured creditors prohibiting them from claiming any further interest on the debt after the statutory period. There is no exception to the said section.

[21] Section 8(2A) of the Act reads as follows:

> Notwithstanding sub-section (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

Section 4(1) of the Civil Law Act 1956 provides as follows:

> In the administration by any Court of the assets of any deceased person whose estate proves to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under any law from time to time in force relating to companies, whose assets prove to be insufficient for the payment of its debts and liabilities, and the costs of winding-up, the same rules shall prevail and be observed, as to the respective rights of secured an unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt.

[22] Section 8(2A) came into force on 17 July 1992. Therefore, by statute law, lenders/chargees are required by law to realise their security swiftly within six months of the adjudication order or winding up order failing which they cannot claim any interest whatsoever on the debt.

[23] My view above is fortified by the Hansard of Parliament who had on 14 May 1992 and 2 June 1992 respectively debated the Bankruptcy (Amendment) Bill 1992:

> … Seterusnya pindaan adalah juga dicadangkan dibuat kepada Seksyen 8 bagi memperuntukkan bahawa tiada apa-apa bunga boleh dibayar kepada pemiutang bercagar jika sekiranya pemiutang tersebut gagal menghasilkan cagarannya dalam tempoh 6 bulan dari tarikh perintah penerimaan dibuat. Rasionalnya ialah pada amalan biasa dan berdasarkan peruntukan yang sedia ada, didapati segolongan pemiutang bercagar mengambil masa yang terlalu lama untuk menghasilkan harta tersebut. Manakala, bunga yang perlu dibayar oleh penghutang berterusan

A sehinggalah jualan dilaksanakan. Perbuatan sedemikian adalah tidak adil kepada pemiutang yang tidak bercagar dan juga kepada penghutang.

[24] In *Pepper v Hart* [1992] 3 WLR 1032; [1993] 1 All ER 42 (HL), the B House of Lords abolished the 'exclusionary rule' that reports of parliamentary debates could not be consulted by the courts when seeking guidance as to the meaning of a particular piece of legislation. The 'exclusionary rule' which was one of the best established of our rules of statutory interpretation, has now been replaced by the 'inclusionary rule', that is, the rule that courts may, in C certain circumstances, make use of Hansard as an aid to the construction of a statute.

[25] In my considered opinion, the rationale behind s 8(2A) of the Act is very clear and unambiguous. The section caps the maximum interest that can D be claimed by a secured creditor from whatever source. This section was introduced by Parliament to prevent secured creditors from claiming unlimited interest on the debt either from the security or from the guarantors or sureties. It prevents the secured creditors from fleecing the guarantor's or the bankrupt's or wound up company's securities if they do not realise the E securities within the statutory period. And if the security of the bankrupt or the wound up company is insufficient to pay the secured creditor as at the date of AORO or the winding up.

[26] If this is not the purpose and intent for which s 8(2A) of the Act was F enacted by the Parliament, then, all guarantors will be at the mercy of lenders/chargees, who can take their own sweet time to realise their security. It will be like drawing money from a bottomless well and lenders can reap hefty rewards in the form of interest at infinitum.

G **[27]** In this instant case, as at 19 June 2002, the date of winding up of Monzo (M) Sdn Bhd, the amount due to the plaintiff was RM1,022,134.75. The plaintiff had six months to realise its securities on or before 18 December 2002 which means according to the plaintiff's own statement of account, the amount due to the plaintiff is RM1,077,407.39 (inclusive of interest as at 18 H December 2002) since the secured creditor did not realise the securities before 18 December 2002. The secured creditor is only entitled to RM1,022,134.77 as at 19 June 2002, the date of winding up of company.

[28] The case in point is *OCBC Bank (Malaysia) Bhd v Tan Eng Kee and* I *another application*. In this case, the effect of s 8(2A) of the Act came to be determined before the High Court at Melaka where the official assignee, acting for the defendant/charger, who had been made a bankrupt, objected to the plaintiff's/chargee's attempt to recover contractual interest in respect of the former's debt incurred after the making of the receiving order. The

contention of the official assignee was, while he would not object to the application for an order for sale of the property charged to the plaintiff/chargee as security, he could not agree to the claim on interest in respect of the debt made in the application as the plaintiff/chargee failed to realise the property within six months from the date of the receiving order. Therefore, the plaintiff's/chargee's claim on contractual interest should be restricted up to the date of the receiving order.

[29] Prior to the enactment of s 8(2A) of the Act, the Malaysian courts had consistently taken the view that a secured creditor who choose not to prove in the bankruptcy of the debtor should not be deprived of the interest which the contract allows. However, in the light of the amendment made to s 8 of the Act, incorporating a new sub-s 2A, which came into force on 17 July 1992, this approach is no longer tenable.

[30] The court in this instant case was in full agreement with the official assignee's contention. The previous position adopted by the courts vis-à-vis full claim on contractual interest was no longer applicable in view on the clear and ambiguous terms in s 8(2A) of the Act. Consequently, the court held, as the plaintiff/chargee had failed to realise the property within six months from the date of the receiving order, the plaintiff/chargee could not be allowed to claim the full contractual interest post the date of the receiving order. In this regard, the court construed the realisation of the security as the act of receiving payment of the proceeds from the successful bidder pursuant to the order for sale.

[31] The above decisions effectively restricts secured creditor's claims for contractual interest on outstanding debts against debtors, who have a receiving order under against them, to the date the order is made if they fail to receive proceeds of sale of the security within the stipulated six months.

[32] In the end, Low Hop Bing J (as he then was) ordered that the chargee was entitled to only RM4,803,362.60 being the amount due as at the AORO (4 October 2001) and not RM5,212,816.01 which was the amount as at the order of sale (23 January 2003).

[33] As regards the plaintiff's contention that they are entitled to interest under the letter of guarantee and indemnity dated 14 November 2000, with respect, it is misconceived because:

(a) Section 8(2A) of the Act read together with s 4(1) of the Civil Law Act 1956 forbids such a claim.

(b) There is no provision in s 8(2A) of the Act to allow the plaintiff to contract out of an Act of Parliament and therefore the said letter of

guarantee and indemnity dated 14 November 2000 is void to that extent ie if the security is not realised within six months of the AORO or the winding up, the plaintiff is not entitled to any interest thereafter.

(c) The contract contained in the letter of guarantee and indemnity dated 14 November 2000 making the guarantor liable for interest after the statutory period if the plaintiff is unable to realise the security within six months from the AORO or winding up is therefore void, illegal and unenforceable as it defeats the purpose and intent of s 8(2A) of the Act.

(d) Even if the plaintiff has mentioned in their letter of guarantee and indemnity dated 14 November 2000 that they are excluding the application of s 8(2A) of the Act, this would itself be void and unenforceable.

(e) The letter of guarantee and indemnity dated 14 November 2000 is part and parcel and connected and made pursuant to the charge dated 30 January 2001. It is not an independent and separate document.

[34] Section 24 of the Contracts Act 1950 states that:

> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (e) the court regards it as immoral, or opposed to public policy.

[35] The provisions of s 24 of the Contract Act 1950 referred to above are explicit statutory injunctions. The statutes provides expressly that the considerations or objects referred to in cll (a), (b) and (e) of s 24 shall be unlawful and the agreement which ensures shall be unlawful and void.

[36] Where the consideration or object of an agreement is of such a nature that, if permitted, it would defeat any law, such an agreement is unlawful and thus void by virtue of cl (b) of s 24 of the Act. Sometimes, the nature of act may be such that it is not directly forbidden by law but, if permitted, it would defeat the provisions of any law. 'Law' means any law for the time being in force in Malaysia. In *Hee Cheng v Krishnan* [1955] MLJ 103 (HC), the alleged agreement was in fact an attempt to sell and to purchase the defendant's rights under the temporary occupation licence. It contravened r 41 of the Land Rules 1930 which stated — 'No licence for the temporary occupation of the State land shall be transferable'. It was, thus, held that the agreement was unlawful under cl (b) of s 24 as being of such a nature that if permitted it would defeat the provisions of any law. In *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587 (CA), a club, by the

terms of an agreement had assigned to the respondent all the rights and benefits conferred by the original licence. The respondent was to do everything the club could do by virtue of the original licence and in return the club was to receive two per cent of the gross takings. Subsequently, a new licence was issued to the club under s 5 of the Pool Betting Act 1967. One of the conditions of the licence prohibited any transfer or assignment of the whole or part of any of the rights, duties and obligation appearing in the licence. The Court of Appeal held that the agreement was illegal and void because it violated the terms of the new licence. The court observed:

> In our judgment, it does not matter that the prohibition against transfer or assignment appears as a condition in the new licence and not in the Act. Having regard to the scheme and policy of the Act, it does not matter whether the prohibition against assignment is contained in the Act or merely in the licence. The result is the same.

[37] Thus, in the aforesaid case, the agreement, if countenanced, would defeat the Act. The agreement, therefore, falls squarely within s 24(b) of the Contracts Act 1950, and is, by reason thereof, illegal and void.

[38] In the case of *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 it was held by the Federal Court that, '… Thus it is clear that only terms and conditions designed to comply with the requirements of the rules that may be inserted in a contract of sale of land that is governed by the Act and rules, and that on the contrary terms and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted'.

[39] With respect, the provisions in question here are similar to those in *Johnson v Moreton* [1980] AC 37, a House of Lords decision, where at p 49 Lord Hailsham said:

> The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength.
>
> The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament — as was attempted here — where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest.

[40] Here, the guarantor is the weaker party who is dealing with a gigantic banking institution and should be protected by the court. Further there is also no explicit language in s 8(2A) of the Act for the secured creditor to claim interest from the guarantor after the statutory period.

[41] In the case of *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 the Supreme Court held '... The stipulation that no liability is undertaken until premium is paid in full is void as being contrary to the provisions of s 76. This is the position in cases where cover notes are issued before full premia are collected. Parties cannot contract out of an Act of Parliament, that is to say they cannot include in their contract terms and conditions which are contrary to the provisions of the Act. If they do so such terms and conditions are void: *SEA Housing Corporation Sdn Bhd v Lee Poh Choo*'.

CONCLUSION

[42] It will, therefore, be unconscionable and wrong for the lender/chargee to be entitled to interest after the bankruptcy order or winding up of a company because a bankrupt or a wound up company is financially 'dead' or 'crippled' and therefore guarantors will be unable to recover whatever they pay to the lenders/chargees will receive their full sum of the principal and interest up to the date of winding up of a company or bankruptcy. The profit making venture ends on the date of winding up of a company or bankruptcy of a person.

[43] In the premise, judgment is entered in favour of the plaintiff in the sum of RM1,022,134.75 and each party to pay their own costs.

Plaintiff's claim allowed.

Reported by Kanesh Sundrum